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9 IN THE UNITED STATES DISTRICT COURT
10 FOR THE DISTRICT OF OREGON

11 TAMMY H. GALBREATH,)
12)
13 Plaintiff,)
14 v.)
15)
16 COMMISSIONER OF SOCIAL)
SECURITY,)
Defendant.)
_____)

No. CV-04-1001-HU

FINDINGS & RECOMMENDATION

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1 - FINDINGS & RECOMMENDATION

1 HUBEL, Magistrate Judge:

2 Plaintiff Tammy Galbreath brings this action for judicial
3 review of the Commissioner's final decision to deny supplemental
4 security income (SSI). This Court has jurisdiction under 42 U.S.C.
5 §§ 405(g) (incorporated by 42 U.S.C. § 1383(c)(3)). I recommend
6 that the Commissioner's decision be reversed and remanded for
7 further consideration by the ALJ.

8 PROCEDURAL BACKGROUND

9 Plaintiff applied for SSI on June 11, 2001, alleging an onset
10 date of October 1, 1999. Tr. 60, 61. Her application was denied
11 initially and on reconsideration. Tr. 29, 30, 31-35, 38-40.

12 On December 12, 2002, plaintiff, represented by counsel,
13 appeared for a hearing before an Administrative Law Judge (ALJ).
14 Tr. 319-64. On March 25, 2003, the ALJ found plaintiff not
15 disabled. Tr. 15-28. The Appeals Council denied plaintiff's
16 request for review of the ALJ's decision. Tr. 5-9.

17 FACTUAL BACKGROUND

18 Plaintiff initially alleged disability based on an inability
19 to understand and follow instructions. Tr. 68. She presently
20 contends that she is disabled based on combined impairments,
21 including borderline intellectual functioning, depression, hand
22 numbness, and a somatoform disorder. Pltf's Op. Brief at p. 2. At
23 the time of the December 12, 2002 hearing, plaintiff was twenty-two
24 years old. Tr. 61 (showing June 9, 1980 birthdate). She has a
25 "modified" high school diploma, suggesting she graduated from high
26 school, but with the assistance of the "resource room." Tr. 329.
27 She has no past relevant work. Tr. 25.

28 I. Medical Evidence

2 - FINDINGS & RECOMMENDATION

1 The relevant medical records begin in January 2000 when
2 plaintiff was seen by Physician's Assistant Mitchell Wilson for
3 resumption of Depo-Provera. Tr. 173.¹ Wilson noted that plaintiff
4 had been on birth control pills for about one month, but had had a
5 hard time remembering to take them regularly. Id. He administered
6 a Depo-Provera injection and instructed her to return in three
7 weeks. Id.

8 Plaintiff saw Wilson again on January 14, 2000 for a Special
9 Olympics history and physical. Tr. 263. Wilson's chart note
10 states that plaintiff has a history of mild mental retardation, has
11 an infant son, but is adequately "plugged into" social services,
12 and that there was no restriction on her participation in Special
13 Olympics activities which could even be beneficial to her
14 mechanical low back pain. Id.

15 In February 2000, Dr. Sonia J. Schuemann, M.D., apparently
16 with The Dalles Clinic, examined plaintiff for a "CBNH" physical.
17 Id. She noted that the physical was routine except for plaintiff's
18 poor dentition, and there were no contraindications to working at
19 the nursing home. Id.

20 In June 2000, plaintiff complained of low back pain which was
21

22 ¹ The List of Exhibits identifies records appearing at
23 pages 246-82 as being from The Dalles Clinic, including several
24 chart notes from Wilson and other practitioners. The chart notes
25 themselves lack any particular clinic affiliation. Most of these
26 chart notes are repeated at pages 163-85 which are identified as
27 being chart notes by Wilson with no indication of a clinic
28 affiliation. I assume that all of Wilson's chart notes, even if
not identified as such, are from his practice at The Dalles
Clinic. I further assume that all chart notes appearing at pages
246-82 are made by practitioners associated with The Dalles
Clinic.

1 diagnosed as sacroiliitis. Tr. 261. She received Relafen and
2 Vicodin for pain. Id. She received refills of Vicodin in
3 September and October 2000 for the low back pain, and for abdominal
4 pain of which she complained in August 2000. Tr. 259-60. She
5 received Vioxx in addition to Vicodin in February 2001 for an
6 aggravation of the sacroiliitis triggered by a sudden movement.
7 Tr. 256.

8 In March 2001, plaintiff saw Wilson for complaints of light
9 headedness, visual "black-outs" and nausea. Tr. 255. She also
10 complained of dysesthesias of the right wrist and hand which were
11 worse at night. Id. Her medications at the time included
12 occasional Vicodin for back pain. Id.

13 Wilson performed a screening for depression and noted that
14 over the previous six months, plaintiff experienced a sad mood with
15 frequent crying spells, and also had significant anhedonia,
16 fatigue, insomnia, decreased concentration, decreased appetite,
17 guilty ruminations, and psychomotor vegetation. Id. He diagnosed
18 her with a major depressive episode. Id. He prescribed the anti-
19 depressant Effexor. Id.

20 Later that month, plaintiff returned to see Wilson and stated
21 that she stopped taking the Effexor because she vomited. Tr. 254.
22 She requested a prescription for Vicodin for migraine headaches.
23 Id. She complained of continued right hand numbness, but without
24 pain, overuse, or trauma. Id.

25 Physical examination of the right hand showed no erythema,
26 edema, deformity, or pallor. Id. She had good grip strength and
27 her intrinsic muscle strength was intact. Id. Her vascular exam
28 was intact, but she had a decreased sensation to pin prick, in a

1 glove type pattern, with no particular dermatomal distribution.
2 Id.

3 Wilson assessed plaintiff as having dysesthesia in the right
4 hand, "in a [patient] with suspected depression and a [history] of
5 somatization." Tr. 254. He stated that the existence of some
6 carpal tunnel syndrome, "with the [patient] simply embellishing
7 some of the symptoms" should be considered. Id.

8 He prescribed a wrist splint for her right hand to wear around
9 the clock. Id. She was to return in two weeks if her symptoms did
10 not improve. Id. He denied her request for Vicodin, but
11 prescribed Zomig for treatment of migraine headache pain. Id.

12 On April 19, 2001, Wilson noted that plaintiff had complained
13 of headaches and had experienced orthostatic hypotension and
14 depression since a fall 2000 motor vehicle accident. Tr. 253. He
15 further noted that her work-up has been "essentially unremarkable."
16 Id. He explained that plaintiff had stated in an earlier visit
17 that she discontinued her Effexor, initially prescribed in March
18 2001, because of nausea and vomiting, but that during the April 19,
19 2001 examination, she told him that she had just run out of the
20 medication. Id. She denied having any gastrointestinal side
21 effects. Id. Wilson discussed medication compliance with her.
22 Id.

23 He again denied plaintiff's request for Vicodin. Id. He
24 explained that he believed her headaches and orthostatic
25 hypotension were due to "autonomic dysfunction, probably from her
26 [motor vehicle accident] and her depression." Id. He gave her a
27 new Effexor starter pack and some ibuprofen. Id. There is no
28 mention of her right hand numbness in this chart note. Id.

1 On April 27, 2001, plaintiff was seen by Family Nurse
2 Practitioner Jennifer Hanlon, apparently at The Dalles Clinic. Tr.
3 252. She complained of depression and "shakiness" which she
4 indicated was caused by the Effexor that Wilson had given her on
5 April 14, 2001. Id. She apparently had been to the emergency room
6 the previous day and requested that Hanlon give her more diazepam
7 which the emergency staff had given her. Id.

8 Plaintiff told Hanlon that since October 2000, she had daily
9 bad moods, difficulty sleeping, tearfulness, irritability, and what
10 Hanlon described as anhedonia. Id. She denied being suicidal.
11 Id. She also complained about frequent migraines, stating that
12 Vicodin was the only medication that worked for the headache pain,
13 but indicating that she was unable to obtain any. Id.

14 Hanlon described plaintiff as being somewhat reticent but
15 generally cooperative and with a low affect. Id. She described
16 her situation as "complicated." Id. Hanlon noted that plaintiff
17 did "carry a [diagnosis] of adjustment disorder, with depressed
18 mood," and "certainly [had] some features of depression." Id.
19 Hanlon prescribed Zoloft and stated that plaintiff was due to see
20 "Dr. Irvine" in about two weeks. Id.

21 The next relevant chart note from the clinic is dated
22 September 21, 2001, by Hanlon. Tr. 250. Hanlon reported that
23 plaintiff came in for a complete physical exam. Id. Plaintiff
24 stated that she was trying to get pregnant, despite the fact that
25 her two-year old son was in state custody. Id. She was unemployed
26 and not taking prenatal vitamins or any other medications. Id.
27 Her history included "[n]otable for learning disability[.]" Id.
28 Hanlon noted that her gynecological exam was normal, but that

1 plaintiff was "challenged by poor learning and judgement skills."
2 Id. Hanlon tried to engage her in a discussion about the wisdom of
3 attempting pregnancy in her current situation, but also informed
4 her that if she was at risk for pregnancy, she should be taking a
5 daily prenatal vitamin with folate. Id.

6 On December 10, 2001, Dr. Brendon R. Irvine, M.D., examined
7 plaintiff for a follow-up of abdominal pain. Tr. 249. She was
8 currently taking Zantac and Permethazine. Id. She reported not
9 sleeping, having an increased appetite, and having decreased
10 enjoyment. Id. Dr. Irvine assessed her as having abdominal pain
11 with an unclear etiology. Id. He noted her history of amenorrhea,
12 but with normal labs and normal ultrasounds. Id. He prescribed
13 Triphasil to regulate her periods and Wellbutrin for her adjustment
14 disorder with depressed mood. Id.

15 On September 10, 2002, plaintiff was examined by Dr. Robert
16 Mishra, M.D., apparently at The Dalles Clinic, for management of
17 depression and low back pain. Tr. 248. She was two weeks post-
18 partum and reported a long history of right sided muscular back
19 pain. Id. Dr. Mishra reported that Dr. Irvine had investigated
20 the back pain and thought it to be minor nerve irritation. Id.
21 Dr. Mishra noted that plaintiff managed her symptoms with one or
22 two Vicodin per day, using between thirty and fifty in a month.
23 Id. Plaintiff requested a referral to a chiropractor. Id.

24 In regard to her depression, Dr. Mishra noted that plaintiff
25 had a long history of major depression which had responded well in
26 the past to Effexor. Id. She had not taken it during her
27 pregnancy and wanted to start again. Id.

28 On examination, Dr. Mishra found plaintiff's affect to be

1 appropriate and noted some pain in the right buttock area which
2 seemed to radiate from the low back and which could be radicular in
3 origin. Id. He assessed her as having mild depression and chronic
4 low back pain. Id. He gave her samples of Effexor, enough to last
5 one month, Vicodin, and a referral to a chiropractor. Id.

6 On October 22, 2002, Dr. Mishra prescribed a continuing course
7 of Effexor to help with the symptoms of plaintiff's depression.
8 Tr. 246.

9 During the time plaintiff was being treated at The Dalles
10 Clinic from January 2000 to October 2002, she was evaluated at the
11 request of her Vocational Rehabilitation Counselor on March 20,
12 2001, by psychologist Jim Greenough, Ph.D. Tr. 157-62. During the
13 evaluation, he administered the following tests: Wechsler Adult
14 Intelligence Scale-III, Wide Range Achievement Test-3, and the
15 Wechsler Individual Achievement Test. Tr. 159.

16 Test results placed plaintiff in the borderline range of
17 intellectual ability. Id. She obtained verbal and performance IQs
18 of 72 and 80, summarized in a full scale IQ of 74. Id.
19 Supplementary index scores ranged from a low of 70 on verbal
20 comprehension to a high of 84 on perceptual organization. Id.
21 Processing speed and working memory were in the mid to upper end of
22 the borderline range. Id. Dr. Greenough noted that plaintiff's
23 scores were "pretty consistent," and that it was his impression
24 that plaintiff made a good effort, leading him to believe that this
25 was a reasonable estimate of plaintiff's abilities. Id.

26 Plaintiff's academic achievement was uniformly low, though not
27 low enough to document a learning disability in view of the
28 intellectual limitations. Id. Plaintiff's word recognition

1 reading was at the fourth grade level and at a standard score of
2 69; math was at the third grade level at a standard score of 65;
3 spelling was at the fifth grade level, at a standard score of 73.
4 Tr. 159-60. Additional testing with the Wechsler Individual
5 Achievement Test tended to confirm the general range of results on
6 the Wide Range Achievement Test-3. Tr. 160.

7 Dr. Greenough diagnosed plaintiff as having borderline
8 intellectual ability and narcissistic and perhaps self-defeating
9 personality characteristics. Id. He found her Global Assessment
10 of Functioning (GAF) to be 50. Id. In the findings and
11 recommendations section of his report, Dr. Greenough noted that he
12 offered no diagnosis in regard to what plaintiff reported as
13 "depression spells." Tr. 161. He indicated he could not assess
14 what was involved. Id. Plaintiff reported these as "seizures"
15 but, Dr. Greenough noted, there was no medical evidence documenting
16 a seizure disorder. Id.

17 Dr. Greenough stated that there were "some personality
18 characteristics of note." Id. He noted that plaintiff tended to
19 blame others for most of her difficulties, and that there may be
20 some narcissistic features reflected in her tendency to focus on
21 herself and her own needs to the exclusion of those around her.
22 Id. Finally, he noted that she wanted to work soon, but was in too
23 much of a hurry to consider training options. Id. He stated that
24 if she did eventually want training, her goal of becoming a
25 certified nurse's assistant seemed feasible, although she might
26 require some assistance with test taking and the more academic
27 aspects of training. Id. At the time Dr. Greenough examined her,
28 he thought that the most that could be offered would be some

1 assistance in finding a job, assistance in presenting herself on
2 application, and perhaps some coaching in regard to ways to hold a
3 job and resolve conflicts which arise on the job. Id.

4 In September 2001, Disability Determination Services (DDS)
5 professionals offered assessments of plaintiff's functioning. Tr.
6 186-203. On September 28, 2001, DDS psychologist Paul Rethinger,
7 Ph.D., completed a Psychiatric Review Technique (PRT) form
8 indicating that a residual functional capacity (RFC) was necessary
9 based on plaintiff's borderline intellectual functioning. Tr. 186-
10 87. In the functional limitations section of that form, Dr.
11 Rethinger assessed plaintiff as having mild restrictions in daily
12 living, mild difficulties in maintaining social functioning, and
13 moderate difficulties in maintaining concentration, persistence, or
14 pace. Tr. 196.

15 On that same date, Dr. Rethinger completed a mental RFC
16 assessment. Tr. 200-03. Dr. Rethinger found plaintiff to be
17 markedly limited in her ability to understand and remember detailed
18 instructions, and moderately limited in her ability to carry out
19 detailed instructions, in her ability to interact appropriately
20 with the general public, and in her ability to set realistic goals
21 or make plans independently of others. Tr. 200-02. In Dr.
22 Rethinger's opinion, plaintiff was not significantly limited in any
23 other mental functional capacity. Id.

24 In January 2002, a different DDS psychologist completed
25 another PRT form and another mental RFC assessment of plaintiff.
26 Tr. 209-26. Bill Hennings, Ph.D., also indicated that an RFC
27 assessment was necessary based on plaintiff's borderline
28 intellectual functioning. Tr. 209-10. In the functional

1 limitation section of the PRT form, he rated plaintiff as having
2 mild restrictions of activities of daily living and in maintaining
3 social functioning, and as having moderate difficulties in
4 maintaining concentration, persistence, or pace. Tr. 219.

5 In the mental RFC, Dr. Hennings assessed plaintiff as being
6 moderately limited in the ability to understand and remember
7 detailed instructions, the ability to carry out detailed
8 instructions, the ability to interact appropriately with the
9 general public, and the ability to set realistic goals or make
10 plans independently of others. Tr. 223-24. He opined that
11 plaintiff was not significantly limited in any other mental
12 function. Tr. 224.

13 In January 2002, plaintiff received an "Individual Support
14 Plan" from the Developmental Disabilities Program at the Mid-
15 Columbia Center for Living. Tr. 236. It suggests that plaintiff
16 was to be placed at the Columbia Gorge Center for job development
17 and support. Id. At the time, her listed medications were only
18 prenatal vitamins. Tr. 237. Her long range goal was identified as
19 being employed in the community, doing housekeeping. Tr. 238. In
20 the short term, she was to answer phones at "TDWS" on Thursdays,
21 with additional days a possibility. Id. She was to learn job
22 search skills by attending a "job club," working with the
23 Employment Coordinator, and watching informative videos on job
24 development. Id. The comment section at the end of the Individual
25 Support Plan states that plaintiff was interested in pursuing a
26 certified nurse's aide certificate in the future but, because she
27 was pregnant at the time, she did not believe that it would be
28 beneficial to pursue it. Tr. 241.

1 Staff at the Columbia Gorge Center completed an "Employability
2 Assessment Report" regarding plaintiff on January 22, 2002. Tr.
3 230-32. The author of the report was able to obtain a copy of
4 plaintiff's high school records showing that plaintiff was at the
5 third grade benchmark, with the ability to add, subtract, multiply,
6 and divide up to three digits. Tr. 230. In high school, she
7 received training regarding writing checks, balancing a check book,
8 paying bills, and budgeting household money. Id.

9 The author stated that plaintiff's work history was extremely
10 limited consisting of four jobs, none lasting more than three
11 months. Id. Reasons for termination from these positions
12 including non-compliance of company cleaning policies, frequent
13 illness, and accusations of theft which were not prosecuted due to
14 inconclusive evidence. Id. Her transferable skills were
15 identified as housekeeping duties and child care, as well as the
16 ability to answer a multi-line phone system and take legible
17 messages. Tr. 231.

18 The author reported that plaintiff expressed concern that she
19 would be unable to obtain or maintain community employment due to
20 past temper explosions followed by black outs. Id. The author was
21 unable to find any documentation to support these episodes. Id.
22 Finally, the author recommended that before proceeding with job
23 development, plaintiff go through some neurological testing to
24 address the question of black outs, and that she continue to work
25 at the Columbia Gorge Center where she could be closely monitored
26 and receive the support necessary to build employment skills. Tr.
27 232.

28 A November 2002 Progress Report states that plaintiff attended

1 the Columbia Gorge Center from January 28, 2002 to June 30, 2002,
2 participating in a situational assessment at the reception desk.
3 Tr. 229. Plaintiff had difficulty following simple directions and
4 staying on task. Id. She had to be reminded repeatedly not to
5 make personal phone calls and talk to friends while she was
6 working. Id. She also missed excessive time from work without
7 calling to notify her supervisor. Id. The author of the Progress
8 Report stated that it was the finding of the Columbia Gorge Center
9 that due to plaintiff's prior work history, consisting of several
10 extremely short stay positions that all resulted in her being
11 terminated for various reasons, and the Center's assessment, it
12 would be extremely unlikely that plaintiff would either obtain or
13 maintain gainful employment. Id.

14 As part of her experience at the Columbia Gorge Center and the
15 Mid-Columbia Center for Living Developmental Disabilities Program,
16 plaintiff was evaluated in May 2002 by psychologist Lawrence J.
17 Lyon, Ph.D. Tr. 227-29. Dr. Lyon referred to prior evaluations
18 performed by him, but none are in the Administrative Record. Tr.
19 227, 228 (referring to prior evaluations in general and noting an
20 examination on July 28, 1998). It appears that plaintiff's mother,
21 Teresa Taketa, was present during the evaluation. Id.

22 Dr. Lyon noted that when he examined plaintiff in July 1998,
23 she achieved a Verbal Scale IQ score of 71, a Performance Scale IQ
24 score of 81, and a Full Scale IQ score of 74. Tr. 228. In May
25 2002, Dr. Lyon reported that "[t]he Vineland Adaptive Behavior
26 Scales: Interview Addition Survey Form was completed with"
27 plaintiff's mother "serving as respondent." Id. The following
28 scores were obtained: "(Standard Score Mean = 100, Standard

Deviation = 15):

<u>Domain</u>	<u>Standard Score</u>	<u>Age Equivalent</u>
Communication	39	8-1
Daily Living Skills	80	13-9
Socialization	44	5-9
Adaptive Behavior		
Composite	50	

Id.

Dr. Lyon stated that based on the current Vineland scores, in conjunction with plaintiff's earlier intellectual scores, it was appropriate to revise the estimate of her intellectual functioning to the "Mildly Retarded range (DSM-IV code: 317)." Id. He noted that while plaintiff appeared to have better-developed adaptive skills in some areas, it was clear that in the areas of communication and socialization she functioned in the mentally handicapped range. Id. Dr. Lyon believed plaintiff was eligible for developmental disability services under the current guidelines. Id. He stated that she continued to have major problems with decision-making and social judgment, and would benefit from ongoing counseling and case management. Id.

A May 31, 2002 "Diagnosis and Evaluation Services Eligibility Summary" is listed in the Administrative Record's List of Exhibits as having been prepared by Mid-Columbia Center for Living Developmental Disabilities Program, although there is no such identifying information on the document itself. Tr. 3, 242-45. The Summary indicates that plaintiff was eligible for certain unspecified services by virtue of having an IQ between 70-75, with an adaptive assessment that verified mental retardation. Tr. 242. An attachment to the Summary shows that certain data were reviewed in making the eligibility determination, including psychometric

1 testing administered at ages 10, 12, and 18, and adaptive
2 assessments administered at ages 10, 12, and 21. Tr. 244. The
3 earlier full scale IQ scores were 62-72 at age 10, 64 at age 12,
4 and 74 at age 18. Id. The composite adaptive assessment scores
5 were 79 (classroom) at age 10, 73 (based on interview with mother)
6 at age 10, and 72 at age 12. Id.

7 II. Medical Expert Testimony

8 Psychologist Robert Davis, Ph.D. testified at the hearing as
9 a medical expert. Dr. Davis indicated that plaintiff had
10 borderline intelligence and a diagnosis of mild mental retardation.
11 Tr. 349-50. He noted her improvement over the years in certain of
12 her IQ scores and explained that IQ scores often improve as one
13 matures because the "social component of IQ is buttressed somehow
14 by life experience and full maturity, and so a person that's 18
15 might appear to be of very low IQ and by the time they're 25 you
16 see a substantial difference and improvement, and it seems to me
17 that she's already demonstrating that." Tr. 350. He characterized
18 the improvement as "quite dramatic." Id. He also noted that her
19 performance IQ was "very close to the normal range[]" which was
20 significant because it measures the "skills that one typically uses
21 in non-social-contact type of jobs in things like . . . assembly or
22 mechanical things . . . [, or] things that involve organization and
23 hand-eye coordination[.]" Tr. 351.

24 Dr. Davis also opined that much of the medical evidence was
25 focused on plaintiff's low IQ and that there had not been an
26 adequate study of her emotional disturbance, if any. Tr. 348. He
27 concluded, based on the evidence to date, that she did not meet the
28 listings for a medical disturbance, but he was concerned with Dr.

1 Lyon's May 2002 finding that plaintiff's socialization was at an
2 age six level. Tr. 348-49. Dr. Davis expressed doubt about that
3 finding and noted that it was questionable because it was based on
4 an interview with plaintiff's mother whose own disabilities could
5 impact the credibility of her information. Tr. 349.

6 Dr. Davis explained that there were essentially two choices:

7 Either there's no medically significant disturbance here
8 and she does not meet the listings at all or we don't
9 have adequate information. I think the latter is true
and would hope that some further study --

10 Id.

11 Dr. Davis also testified about the relationship between
12 certain test scores and corresponding IQ percentiles. Tr. 351-53.
13 This testimony is discussed below.

14 III. Plaintiff's Testimony

15 Plaintiff testified that her math skills are poor, although
16 she can add and subtract. Tr. 329. Her name is on the checking
17 account, but her husband apparently maintains it. Id. She has a
18 driver's license, although at the time of the hearing it had been
19 suspended for driving without insurance. Tr. 330. She obtained
20 her license at age 18, after taking a written test instead of a
21 computer test. Id. She passed the written test on the second try,
22 having repeatedly failed the computer version of the test. Id.

23 Plaintiff explained that she was on SSI as a minor because of
24 a learning disability. Tr. 332. She stated that she cannot read
25 or spell well. Id. When she turned 18, she had to re-apply for
26 SSI benefits. Id.

27 At the time of the hearing, plaintiff had a four-month old
28 daughter and her last job was answering phones at the Columbia

1 Gorge Center in June 2002. Tr. 324, 327. She testified that she
2 was staying home and taking care of her baby. Tr. 332.

3 She indicated that her older child was in state custody,
4 although apparently residing with the child's father. Tr. 326.
5 She testified that there was no chance she would lose custody of
6 her new baby because she gets support from her husband and her
7 husband's family was able to support her as well. Tr. 333-34. She
8 has learned to take a break to relax before her "temper gets too
9 high" by calling family members who will take the baby for a couple
10 of hours. Tr. 334. In addition to taking care of her baby, she
11 also cleans house and cooks dinner. Id.

12 In response to questioning from Dr. Davis, plaintiff indicated
13 that her temper did not interfere with her ability to work in any
14 of her previous jobs or her job placement because she was on anti-
15 depressant medication and it controlled her temper as well as her
16 depression. Tr. 346. She noted that when she took Effexor, it
17 "cleared up" her temper which would flare when she was depressed.
18 Id. She explained that she had stopped taking Effexor on a regular
19 basis, but that she only took it once in awhile when her depression
20 was "really bad." Tr. 347.

21 IV. Lay Witness Testimony

22 Plaintiff's mother Teresa Taketa also testified at the
23 hearing. She testified that plaintiff has a learning disability,
24 that she was in special education in school, and did not graduate
25 with a regular high school diploma, but received a modified
26 diploma. Tr. 338. Taketa stated that plaintiff's math skills were
27 not very good. Id.

28 Taketa explained that she herself was on SSI because it was

1 hard for her to learn. Tr. 339. She stated that she did not think
2 plaintiff could support herself with full-time work because she
3 would not be able to manage living by herself and have someone
4 available to help with the baby. Tr. 341. Taketa suggested that
5 plaintiff exercises poor judgment in food shopping, and that while
6 she can cook simple meals, she could not cook a full course meal by
7 herself. Tr. 342.

8 Taketa expressed her opinion that plaintiff was a wonderful
9 mother and was really good to her baby. Tr. 343. She described
10 plaintiff as taking care of the baby's needs. Id.

11 IV. Vocational Expert Testimony

12 Patricia Ayerza testified at the hearing as a Vocational
13 Expert (VE). The ALJ posed the following hypothetical to the VE:
14 a claimant with no demonstrated exertional impairments, but with
15 non-exertional impairments including a simple routine repetitive or
16 unskilled work environment with little public contract, who could
17 work alone and not part of a team to complete her own assignments
18 and tasks. Tr. 356-57. In addition, the hypothetical claimant
19 would be of plaintiff's age and possess her educational and prior
20 work experiences. Tr. 357.

21 In response, the VE testified that such a person could perform
22 the jobs of cannery worker and small products assembly. Tr. 357.
23 She also identified agricultural produce sorting as an appropriate
24 job that would fit the hypothetical. Tr. 358. She also stated
25 that the hypothetical claimant could perform motel maid or
26 dishwasher jobs. Id.

27 The ALJ then modified the hypothetical to include attention
28 and concentration deficits at a marked level. Id. In response,

1 the VE testified that the hypothetical claimant could not perform
2 any of the occupations she named in response to the original
3 hypothetical. Id.

4 In response to questioning by plaintiff's attorney, the VE
5 indicated that the hypothetical claimant could not perform any of
6 the jobs recited by the VE if her manual dexterity were in the
7 lowest tenth percentile. Tr. 359.

8 THE ALJ'S DECISION

9 The ALJ found that plaintiff had not engaged in any
10 substantial gainful activity. Tr. 19, 27. The ALJ then found that
11 plaintiff had the severe impairment of borderline intellectual
12 functioning. Tr. 21, 27. While finding the impairment to be
13 severe, the ALJ concluded that it did not meet or equal, either
14 alone or in combination with other non-severe impairments, any
15 listed impairment. Id.

16 The ALJ determined that plaintiff had the RFC to perform
17 simple, routine, repetitive, unskilled work involving little public
18 contact and which is performed alone and not part of a team. Tr.
19 25, 27. He further determined that she has no exertional
20 limitations. Id.

21 In reaching his RFC determination, the ALJ rejected
22 plaintiff's testimony suggesting she was incapable of holding a
23 job. The ALJ concluded that while plaintiff has some difficulty
24 related to cognitive/intellectual functioning, some of her
25 statements concerning her impairment and its impact on her ability
26 to work were not fully credited. In support of this conclusion,
27 the ALJ discussed that the objective medical evidence did not fully
28 support claimant's assertions of totally disabling symptoms and

1 limitations, that plaintiff's activities of daily living did not
2 show more than mild limitations in functioning, that plaintiff's
3 difficulties in social functioning were generally mild, and that
4 the record established that plaintiff's difficulties in maintaining
5 concentration, persistence, and pace were moderate at worst. Tr.
6 23-24.

7 The ALJ also declined to give much weight to plaintiff's
8 mother's testimony. Tr. 22-23. He concluded that the credibility
9 of her testimony was undermined by her desire to help her daughter
10 and by her own cognitive limitations. Tr. 23.

11 Based on his RFC, the ALJ, relying on the VE's testimony,
12 concluded that while plaintiff had no past relevant work, plaintiff
13 could perform the jobs of cannery worker, small products assembly
14 worker, and agricultural production sorter. Tr. 25-26. The ALJ
15 also identified maid and dishwasher as jobs that plaintiff could
16 perform. Tr. 26. In reaching this decision, the ALJ rejected
17 plaintiff's argument that these jobs require aptitudes exceeding
18 plaintiff's general learning aptitude and her aptitude in verbal,
19 numerical, and manual dexterity. Tr. 26. This issue is further
20 discussed below. Based on the conclusion that plaintiff could
21 perform the jobs identified by the VE, the ALJ concluded that
22 plaintiff was not disabled.

23 STANDARD OF REVIEW & SEQUENTIAL EVALUATION

24 A claimant is disabled if unable to "engage in any substantial
25 gainful activity by reason of any medically determinable physical
26 or mental impairment which . . . has lasted or can be expected to
27 last for a continuous period of not less than 12 months[.]" 42
28 U.S.C. § 423(d) (1) (A).

20 - FINDINGS & RECOMMENDATION

1 Disability claims are evaluated according to a five-step
2 procedure. Baxter v. Sullivan, 923 F.2d 1391, 1395 (9th Cir.
3 1991). The claimant bears the burden of proving disability.
4 Swenson v. Sullivan, 876 F.2d 683, 687 (9th Cir. 1989). First, the
5 Commissioner determines whether a claimant is engaged in
6 "substantial gainful activity." If so, the claimant is not
7 disabled. Bowen v. Yuckert, 482 U.S. 137, 140 (1987); 20 C.F.R. §§
8 404.1520(b), 416.920(b). In step two, the Commissioner determines
9 whether the claimant has a "medically severe impairment or
10 combination of impairments." Yuckert, 482 U.S. at 140-41; see 20
11 C.F.R. §§ 404.1520(c), 416.920(c). If not, the claimant is not
12 disabled.

13 In step three, the Commissioner determines whether the
14 impairment meets or equals "one of a number of listed impairments
15 that the [Commissioner] acknowledges are so severe as to preclude
16 substantial gainful activity." Yuckert, 482 U.S. at 141; see 20
17 C.F.R. §§ 404.1520(d), 416.920(d). If so, the claimant is
18 conclusively presumed disabled; if not, the Commissioner proceeds
19 to step four. Yuckert, 482 U.S. at 141.

20 In step four the Commissioner determines whether the claimant
21 can still perform "past relevant work." 20 C.F.R. §§ 404.1520(e),
22 416.920(e). If the claimant can, he is not disabled. If he cannot
23 perform past relevant work, the burden shifts to the Commissioner.
24 In step five, the Commissioner must establish that the claimant can
25 perform other work. Yuckert, 482 U.S. at 141-42; see 20 C.F.R. §§
26 404.1520(e) & (f), 416.920(e) & (f). If the Commissioner meets its
27 burden and proves that the claimant is able to perform other work
28 which exists in the national economy, he is not disabled. 20

1 C.F.R. §§ 404.1566, 416.966.

2 The court may set aside the Commissioner's denial of benefits
3 only when the Commissioner's findings are based on legal error or
4 are not supported by substantial evidence in the record as a whole.
5 Baxter, 923 F.2d at 1394. Substantial evidence means "more than a
6 mere scintilla" but "less than a preponderance." Id. It means
7 such relevant evidence as a reasonable mind might accept as
8 adequate to support a conclusion. Id.

9 DISCUSSION

10 Plaintiff alleges that the ALJ committed several errors. The
11 alleged errors can be divided into three groups: (1) errors at
12 step two of the sequential evaluation when the ALJ allegedly
13 incompletely assessed plaintiff's impairments and in particular,
14 failed to recognize her depression as a severe impairment with
15 significant vocational ramifications; (2) errors at step three of
16 the sequential evaluation when the ALJ allegedly improperly
17 concluded that plaintiff did not meet or equal a listed impairment
18 and did not properly consider the combination of her impairments;
19 and (3) errors at step five of the sequential evaluation when the
20 ALJ allegedly improperly determined that plaintiff can perform jobs
21 identified by the VE. I address plaintiff's arguments in turn.

22 I. Step Two Errors

23 As noted above, in step two of the sequential evaluation the
24 ALJ determines whether the claimant has a medically severe
25 impairment. Here, the ALJ engaged in a fairly lengthy discussion
26 of whether plaintiff's impairments were severe. The ALJ correctly
27 noted that an impairment is severe within the meaning of the
28 regulations if it imposes significant restrictions in the ability

1 to perform basic work activities. Tr. 19; 20 C.F.R. §§
2 404.1520(c), 404.1521(a) ("an impairment is not severe if it does
3 not significantly limit [the claimant's] physical ability to do
4 basic work activities[.]").

5 The ALJ initially discussed the evidence regarding plaintiff's
6 cognitive/intellectual functioning, citing assessments by Dr.
7 Greenough in March 2001 and Dr. Lyon in May 2002. Tr. 19-20. He
8 also considered the records from the Columbia Gorge Center. Tr.
9 20. Additionally, he discussed Dr. Davis's testimony. Tr. 20-21.

10 The ALJ noted plaintiff's argument that she was disabled based
11 in part on depression and back problems. Tr. 20. He noted that in
12 the spring of 2001, following a fall 2000 automobile accident, she
13 was diagnosed with major depressive episode and began taking an
14 anti-depressant medication. Id. The ALJ noted that the medical
15 records indicated that plaintiff's depression responded well to
16 medication, but that she stopped taking it during her pregnancy in
17 2002. Id. The ALJ further noted that in September 2002, after the
18 delivery of her baby, the depression was reported to be mild and
19 plaintiff restarted the anti-depressant medication. Id.

20 The ALJ discussed plaintiff's complaints of low back pain and
21 noted that she was diagnosed with chronic low back pain, was
22 prescribed medication, and was referred for chiropractic treatment.
23 Id. As for her hand numbness, he described plaintiff's report in
24 March 2001 of right hand numbness, but noted that the medical
25 record did not establish continued and ongoing reports of right
26 hand numbness. Id.

27 Based on this evidence and discussion, the ALJ concluded that
28 plaintiff's only severe impairment was borderline intellectual

1 functioning. Tr. 21.

2 Plaintiff contends that the ALJ improperly discounted the
3 severity of her depression and that the ALJ failed to recognize her
4 other mental impairments such as an adjustment disorder and a
5 somatization disorder.

6 As to the depression, plaintiff correctly notes that the ALJ
7 appeared to tie her depression to the fall 2000 car accident.
8 Plaintiff argues that this was error because her health care
9 providers consistently noted a long history of depression and her
10 depressive symptoms continued long after the accident.

11 I disagree with plaintiff. The record supports the ALJ's
12 finding that plaintiff first reported symptoms of depression in the
13 spring of 2001, following the fall 2000 car accident. Tr. 255
14 (Wilson performed depression screening, diagnosed plaintiff with a
15 major depressive episode, and prescribed Effexor in March 2001);
16 253 (Wilson noted in April 2001 that plaintiff's depression
17 symptoms began around October 2000, after a motor vehicle
18 accident). To the extent plaintiff argues that her depressive
19 symptoms preexisted the fall 2000 auto accident, the argument is
20 not supported by the record.

21 The record also supports the ALJ's finding that plaintiff's
22 depression responded well to medication. Tr. 248 (Dr. Mishra
23 noting in September 2002, two weeks after plaintiff delivered her
24 baby, plaintiff's long history of depression and that it had
25 responded well in the past to Effexor). The record further
26 supports the ALJ's finding that in September 2002, plaintiff's
27 depression was reported to be mild. Id.

28 While the record supports plaintiff's assertion that her

1 "depressive symptoms continued long after the car accident," e.g.,
2 Tr. 248 (Dr. Mishra noting in September 2002, almost two years
3 after the car accident, that plaintiff had mild depression), the
4 persistence of such symptoms does not contradict the ALJ's
5 conclusion that plaintiff's depression is not severe. The record
6 supports the ALJ's determination that plaintiff's depressive
7 symptoms are mild or are rendered mild by use of anti-depressant
8 medication.² Thus, the ALJ did not err in concluding that
9 plaintiff's depression is not a severe impairment.

10 Plaintiff also contends that the ALJ erred by not recognizing
11 her "somatization disorder" as a severe impairment. The only
12 reference in the record to a "somatization disorder" is in Wilson's
13 March 26, 2001 chart note in which his assessment list reads "1.
14 Dysesthesia, R hand, in pt with suspected depression and a Hx of
15 somatization." Tr. 254.

16 I reject plaintiff's argument that the ALJ erred by not
17 finding a somatization disorder as a severe impairment. First,
18 Wilson's chart note does not make a diagnosis of any kind of
19 disorder, but merely references a history of somatization. Second,
20

21 ² Plaintiff suggests that her "cognitively-related
22 inability to manage her medications" negates any benefit from
23 what would be an effective medication. She cites to a chart note
24 indicating that she was started on Depo-Provera as a birth
25 control method because she forgot to take birth control pills,
26 and to a separate chart note indicating that she stopped taking
27 her anti-depressant Effexor on one occasion because she ran out
28 of it. Tr. 173, 253. Neither of these chart notes supports her
argument that she has a cognitively-related inability to manage
her medications. It is common knowledge that many women of all
intellectual abilities forget to take their birth control pills.
And, neither chart note attributes her failure to take her
medication to her borderline intellectual functioning.

1 the statute provides that any impairment, severe or not, must be
2 demonstrable by medically acceptable clinical and laboratory
3 diagnostic techniques. 42 U.S.C. § 423(d)(3). Here, there are no
4 chart notes reflecting the source of Wilson's comment regarding
5 plaintiff's history of somatization. It is not known if his
6 comment is based on plaintiff's self-report of such a history, on
7 a previous assessment by Wilson, or on a diagnosis by a different
8 medical professional at a different time with Wilson obtaining his
9 knowledge through a chart review. Without such evidence in the
10 record, I cannot determine if Wilson's reference to a history of
11 somatization is supported by medically acceptable clinical
12 techniques. There is nothing in Wilson's chart note suggesting
13 that this history of somatization is severe, and his note is in
14 reference to an apparently transitory condition of impaired
15 sensation in plaintiff's right hand. Given the lack of evidence in
16 the record, the ALJ did not err in failing to find plaintiff's
17 alleged somatization disorder to be a severe impairment.

18 As to plaintiff's "adjustment disorder with depressed mood,"
19 there are two references in the record to this problem. First,
20 Hanlon noted, in April 2001, that plaintiff "does carry a Dx of
21 adjustment disorder, with depressed mood[.]" Tr. 252. This
22 comment was made in the context of a clinic visit in which
23 plaintiff came in for problems with depression and shakiness which
24 she attributed to anti-depressant medication prescribed by Wilson.
25 Id.

26 The second reference is by Dr. Irvine in December 10, 2001,
27 when he examined her for her complaint of abdominal pain. Tr. 249.
28 In his "plan," he stated that he was prescribing Wellbutrin for

1 plaintiff's "adjustment disorder, depressed mood, and tobacco
2 abuse[.]" Id.

3 Dr. Irvine's reference is somewhat ambiguous in that it is
4 unclear if he referred to "adjustment disorder, depressed mood," as
5 one problem or two separate problems. In any event, the ALJ failed
6 to mention Hanlon's or Dr. Irvine's references to any adjustment
7 disorder. It is unclear from the record whether either or both of
8 Hanlon's and Dr. Irvine's notes refer to the same depression noted
9 by Wilson beginning in March 2001, or whether they refer to a
10 separate, independent condition. Because of the ambiguity, I
11 cannot say on this record that the ALJ erred or did not err in not
12 finding the adjustment disorder with depressed mood to be a severe
13 impairment. At a minimum, I conclude that the ALJ should have
14 discussed the disorder given that two practitioners, one of whom is
15 a medical doctor and thus, an acceptable medical source, referred
16 to the disorder, and actually prescribed medication for it. This
17 issue should be remanded to the ALJ.

18 My conclusion is also warranted by Dr. Davis's testimony. In
19 discussing plaintiff's impairments during the hearing, he stated
20 that in his opinion, there had been an inadequate study of her
21 emotional disturbance, if any. Tr. 348. He noted that there had
22 been a lot of focus on plaintiff's "low IQ and things like that[.]"
23 Id. He opined that based on the information regarding plaintiff's
24 intellectual functioning, she did not meet a listed impairment,
25 but, he explained, he believed he did not have "adequate
26 information." Tr. 349. He articulated a hope for "some further
27 study[.]" Id. This testimony supports a remand for the ALJ to
28 consider the references in the record to plaintiff's adjustment

1 disorder with depressed mood and to further evaluate her emotional
2 disturbance as suggested by Dr. Davis.

3 The step two analysis also requires the ALJ to determine if
4 the claimant, who may not have a single severe impairment, has a
5 combination of impairments which is severe. 20 C.F.R. §
6 416.920(a)(4)(ii) (claimant will be found not disabled if claimant
7 does not have a severe medically determinable physical or mental
8 impairment or a combination of impairments that is severe); 20
9 C.F.R. § 416.923 (agency must consider the combined effect of all
10 impairments, both severe and non-severe).

11 Plaintiff contends that even if the ALJ properly assessed her
12 borderline intellectual functioning as her only severe impairment,
13 the ALJ erred in not considering plaintiff's other mental
14 impairments of somatization disorder and adjustment disorder with
15 depressed mood, in combination with her borderline personality
16 disorder. The ALJ does not appear to have directly addressed this
17 issue.

18 At step three, the ALJ did conclude that plaintiff had no
19 impairment or combination of impairments that meets or equals any
20 listed impairment. Tr. 21. However, there is no separate
21 discussion of whether, at step two, the ALJ considered whether
22 plaintiff's impairments, independently severe or not, were severe
23 in combination. Smolen v. Chater, 80 F.3d 1273, 1290 (9th Cir.
24 1996) (important to note that at step two inquiry, "the ALJ must
25 consider the combined effect of all of the claimant's impairments
26 on her ability to function, without regard to whether each alone
27 was sufficiently severe"). While the ALJ's conclusion that
28 plaintiff's depression is not a severe impairment is supported in

1 the record, the ALJ should have discussed whether her mild
2 depression, in combination with her borderline intellectual
3 functioning, resulted in a severe impairment.³

4 II. Step Three Errors

5 In step three, the ALJ assesses whether a claimant's
6 impairment(s) or combination of impairments meets or equals an
7 impairment under 20 C.F.R. pt. 404, subpt. P, App. 1. 20 C.F.R. §
8 416.920(a)(4)(iii). Here, the ALJ concluded that plaintiff had no
9 impairment or combination of impairments that meets or equals the
10 criteria of any of the impairments listed in Appendix 1. Tr. 21.

11 The ALJ relied on Dr. Davis's testimony that plaintiff did not
12 have an impairment or combination of impairments that met or
13 equaled Listing 12.05. Id. The ALJ explained that he (the ALJ),
14 considered all of the listings of Appendix 1, particularly Listings
15 12.05C and 12.05D. Id. However, he found that the record did not
16 establish that plaintiff had a physical or other mental impairment
17 imposing additional and significant work related limitations of
18 functioning or that plaintiff had marked limitations in activities
19 of daily living, social functioning, or concentration, persistence,
20 or pace. Id.

21 Listing 12.05 addresses mental retardation impairments. It
22 provides that a claimant will be considered disabled if he or she
23 satisfies one of four criteria. Plaintiff argues that her
24 combination of borderline personality disorder, depression, or

25
26 ³ If the ALJ, upon remand, finds the adjustment disorder
27 with depressed mood condition noted by Hanlon and Dr. Irvine to
28 be an impairment separate from the depression, the ALJ should
also consider it in the assessment of the effect of the
combination of plaintiff's impairments.

1 other emotional problems, meets or equals Listing 12.05C when
2 considered in combination. Listing 12.05C provides for disability
3 upon the showing of a "valid verbal, performance, or full scale IQ
4 of 60 through 70 and a physical or other mental impairment imposing
5 an additional and significant work-related limitation of
6 function[.]" 20 C.F.R. pt. 404, subpt. P, App. 1, Listing 12.05C.

7 Plaintiff contends that she has a problem with decreased
8 concentration which she alleges is a significant work-related
9 limitation of function. On the present record, I reject
10 plaintiff's argument.

11 In support of her position, plaintiff cites to a March 8, 2001
12 chart note by Wilson. At that visit, Wilson performed a depression
13 screening on plaintiff and noted the following symptoms "evolving
14 over the last [six months]:" sad mood with frequent crying spells,
15 significant anhedonia, fatigue, insomnia, decreased concentration,
16 decreased appetite, guilty ruminations, and psychomotor vegetation.
17 Tr. 164. However, the record does not support a conclusion that
18 any of these symptoms persisted at a "significant" level after
19 plaintiff began taking anti-depressant medication which Wilson
20 prescribed at that visit. Thus, on the record presented, the ALJ
21 did not err in concluding that plaintiff's impairments did not meet
22 or equal a listed impairment.

23 I note, however, that given the errors made by the ALJ in
24 failing to more fully evaluate her adjustment disorder with
25 depressed mood and in failing to fully assess the severity of the
26 combination of any of her impairments, the record is incomplete and
27 the ALJ's step two errors could have impacted the assessment at
28 step three of whether plaintiff's impairments, either singly or in

1 combination, meet or equal a listed impairment. Thus, upon remand,
2 the ALJ, after reevaluating plaintiff's claim at step two, should
3 reevaluate the step three analysis as well.

4 III. Step Five Errors

5 Plaintiff contends that the ALJ made the following errors at
6 step five: (1) improperly rejected plaintiff's testimony; (2)
7 improperly rejected plaintiff's mother's testimony; (3) improperly
8 ignored Dr. Rethinger's functional assessment; (4) improperly
9 concluded that plaintiff's mental aptitude is sufficient to perform
10 the jobs identified by the VE; (5) improperly concluded that
11 plaintiff has the manual dexterity to perform the jobs identified
12 by the VE; and (6) failed to include all of plaintiff's limitations
13 in the hypothetical presented to the VE, rendering the VE's
14 testimony of no evidentiary value.

15 A. Plaintiff's Testimony

16 Plaintiff objects to the ALJ's rejection of her testimony. As
17 noted above, the ALJ rejected plaintiff's testimony for several
18 reasons, including objective medical evidence that did not support
19 plaintiff's claims, activities of daily living showing only mild
20 limitations in functioning, and evidence establishing that
21 particular limitations in concentration, persistence, and pace were
22 moderate at worst. Tr. 23-24.

23 Plaintiff argues that the ALJ used the wrong standard to
24 evaluate her testimony and cites to the following sentence in the
25 ALJ's decision in support of her position: "[t]he objective
26 medical evidence does not fully support the claimant's assertion of
27 totally disabling symptoms and limitations." Tr. 23. Plaintiff
28 argues that this shows that the ALJ used the wrong standard because

1 the Social Security Act does not require that disability claimants
2 be totally disabled or unable to engage in any mental or physical
3 activity.

4 I disagree with plaintiff's characterization of the ALJ's
5 decision. The ALJ's statement is best understood as indicating
6 that in his opinion, plaintiff's claim of disability was not
7 supported by the objective medical evidence. I do not read the
8 statement as a rejection of plaintiff's testimony for failing to
9 establish total disability. As such, I do not read the statement
10 as employing an erroneous standard of incapacity. Thus,
11 plaintiff's argument is not well founded.

12 B. Lay Testimony

13 Lay testimony as to a plaintiff's symptoms or limitations is
14 competent evidence which the Secretary must take into account.
15 Dodrill v. Shalala, 12 F.3d 915, 919 (9th Cir. 1993). The ALJ may
16 disregard such testimony if he or she gives reasons "germane to
17 each witness." Id.

18 Here, the ALJ stated that he considered the testimony of
19 plaintiff's mother, but discounted its weight because first, the
20 relationship between plaintiff and her mother may have influenced
21 her testimony due to the desire to help her daughter and second,
22 her own cognitive limitations may have made her testimony
23 unreliable in some fashion.

24 Even considering the relatively low threshold required to
25 reject lay witness testimony, I conclude that the ALJ's reasons for
26 rejecting plaintiff's mother's testimony are unsupportable.
27 Accepting the ALJ's reasoning that the witness's status as the
28 mother of the plaintiff is a basis for rejecting that witness's

1 testimony would render testimony by any parent, or any family
2 member, suspicious and without weight. There is simply no support
3 for such a categorical dismissal of such testimony. To paraphrase
4 a previous decision by this Court regarding medical testimony,
5 "[t]he Secretary may not assume that [family members] lie in order
6 to help their [kin] collect disability benefits." Ratto v.
7 Secretary, 839 F. Supp. 1415, 1426 (D. Or. 1993). Moreover, the
8 Ninth Circuit has expressly rejected family member status as a
9 basis for finding lay witness testimony in a social security case
10 not credible. Smolen, 80 F.3d at 1289 ("The fact that a lay
11 witness is a family member cannot be a ground for rejecting his or
12 her testimony.").

13 As to plaintiff's mother's own cognitive limitations, the
14 record does not support the ALJ's conclusion that such cognitive
15 limitations, whatever they may be, affect her ability to accurately
16 or honestly describe plaintiff's symptoms and limitations. The ALJ
17 stated that plaintiff's mother's statements "may have been
18 influenced by her . . . own cognitive limitations to which she
19 testified[.]" Tr. 23.

20 The testimony regarding plaintiff's mother's disability was as
21 follows:

22 ALJ: Are you learning handicapped or mentally disabled
23 as well? . . .

24 WTN [plaintiff's mother]: Yeah. I'm on SSI Social
25 Security myself . . . and stuff because it's, you know,
it's hard and stuff, you know, for me to even learn. I
even tried and tried to learn myself and stuff[.]

26 Tr. 339. There is no other testimony regarding her disability. At
27 best, her testimony shows that plaintiff's mother has some kind of
28 learning disability. It provides no basis for the ALJ's assumption

1 that plaintiff's mother is less than able to render honest and
2 accurate testimony regarding her daughter's limitations.
3 Accordingly, the ALJ erred in rejecting plaintiff's mother's
4 testimony. The ALJ must reconsider this testimony upon remand.

5 C. Dr. Rethinger's Functional Assessment

6 In September 2001, non-examining DDS psychologist Paul
7 Rethinger found plaintiff to be markedly limited in her ability to
8 understand and remember detailed instructions, and moderately
9 limited in her abilities to carry out detailed instructions, to
10 interact appropriately with the general public, and to set
11 realistic goals or make plans independently of others. Tr. 200-02.
12 He also found that she had mild restrictions in daily living, mild
13 difficulties in maintaining social functioning, and moderate
14 difficulties in maintaining concentration, persistence, or pace.
15 Tr. 196.

16 While the ALJ did not mention Dr. Rethinger by name, in his
17 RFC assessment the ALJ noted that "the claimant may have some
18 difficulty understanding more complex or detailed instructions."
19 Tr. 24. He also found that she had moderate difficulties
20 maintaining concentration, persistence, and pace. Id. He further
21 noted that she had mild difficulty in the area of social
22 functioning and had mild restrictions of activities of daily
23 living. Tr. 23, 24.

24 The ALJ also referred to the findings of the DDS consultants
25 and specifically noted that they "opined that she could understand
26 and perform simple and short instructions and would work best out
27 of the public eye." Tr. 23. The ALJ's RFC limited plaintiff to
28 work involving little public contact. Tr. 25.

1 Plaintiff argues that the ALJ ignored some of Dr. Rethinger's
2 limitations and contends that upon remand, the ALJ should be
3 instructed to include all of Dr. Rethinger's assessed limitations
4 in a proper vocational hypothetical. I disagree. The ALJ credited
5 each of Dr. Rethinger's limitations. The only one not specifically
6 mentioned or expressly incorporated into the RFC is Dr. Rethinger's
7 moderate limitation on her ability to set realistic goals or make
8 plans independently of others. However, any error in omitting an
9 express discussion of this limitation is harmless because the RFC
10 limiting plaintiff to simple, routine, repetitive, unskilled work
11 is not inconsistent with a moderate limitation on goal setting or
12 independent planning. Thus, I recommend concluding that
13 plaintiff's argument regarding Dr. Rethinger's assessments is
14 without merit.

15 D. Sufficiency of Plaintiff's Mental Aptitude to
16 Perform Jobs Identified by the VE

17 The Dictionary of Occupational Titles (DOT) job descriptions
18 for the jobs identified by the VE as being suitable for plaintiff
19 contain a job description and then show percentiles and typical
20 performances for various aptitudes. Tr. 139-147. For example, the
21 cannery worker position, DOT number 529.686-014, contains a
22 detailed description of duties followed by a table with headings of
23 "Aptitudes," "Percentile", and "Typical Performance." Tr. 140.
24 Eleven separate aptitudes are listed, including "general learning
25 ability," "verbal," "numerical," "motor coordination," and "manual
26 dexterity." Following the listed aptitude is a "score" of some
27 sort, partially explained at pages 146-47. For example, following
28 the listing for "verbal" aptitude on the cannery worker

1 description, the score "V-4" appears. Tr. 140. The explanation at
2 page 146 states that

3 "V" Score: Verbal aptitude is the ability to understand
4 meaning of words and to use them effectively. The
5 ability to comprehend language, to understand
6 relationships between words, and to understand meanings
7 of whole sentences and paragraphs.

8 Tr. 146. There is no explanation of the meaning of the number
9 following the letter such as the "4" following the "V" in "V-4."

10 After the aptitude listings and the scores, the next column
11 has percentiles. Tr. 140. In the cannery worker position table,
12 the verbal aptitude has a 10 to 33 percentile. Tr. 140. Following
13 the percentile column is a "typical performance" column which, for
14 the verbal aptitude in the cannery worker job, states "below
15 average." Id.

16 Plaintiff states, and defendant does not appear to disagree,
17 that every job identified by the VE requires a verbal aptitude of
18 at least the 10th percentile. Tr. 140-45. Plaintiff further
19 states, and defendant does not disagree, that the cannery worker,
20 agricultural produce worker, and motel maid positions all require
21 a numerical aptitude of at least the 10th percentile. Id. The DOT
22 records provided to the ALJ by the VE show that small products
23 assembler also requires a numerical aptitude of at least the 10th
24 percentile. Tr. 142.

25 Plaintiff argues that the evidence in the record shows that
26 her intellectual abilities fall short of these percentile
27 requirements. She notes that in March 2001, Dr. Greenough assessed
28 a verbal IQ of 72, a performance IQ of 80, a full scale IQ of 74,
a verbal comprehension index of 70, and a Wide Range Achievement
test (WRAT) arithmetic standard score of 65. Tr. 159-60. In an

1 attempt to assist the ALJ in correlating these IQ scores to
2 percentiles, plaintiff's then-counsel submitted a table from a
3 publication entitled "Essentials of WAIS-III Assessment" by Alan S.
4 Kaufman and Elizabeth O. Lichtenberger, on how to interpret the
5 WAIS-III. Tr. 150-51. The table shows "National Percentile Ranks
6 Corresponding to Scaled Scores." Tr. 151.

7 Relying on the table, plaintiff's then-counsel pointed out to
8 the ALJ that Dr. Greenough's WAIS-III scaled score was 3 for
9 plaintiff's vocabulary and was 5 for arithmetic. Tr. 148-49, 162.
10 The table correlates a scaled score of 3 (vocabulary) to the 1st
11 percentile and a scaled score of 5 (arithmetic) to the 5th
12 percentile. Tr. 151. Plaintiff's then-counsel also pointed out
13 that her 72 in verbal IQ correlated to something lower than the 5th
14 percentile according to the table. Tr. 148-49, 151.

15 Plaintiff's then-counsel also submitted a different chart from
16 an unknown source showing the relationship of the typical bell
17 curve to various types of scores. Tr. 283-84. Included here is
18 information showing the relationship between IQ scores, standard
19 deviation, and percentiles. Tr. 284. For example, an IQ of 70 is
20 two standard deviations below the mean and is at the 2.3
21 percentile. Id. Plaintiff's then-counsel pointed out to the ALJ
22 that based on this chart, plaintiff's March 2001 full scale IQ of
23 74 is below the 5th percentile. Tr. 283.

24 In his decision, the ALJ accurately noted plaintiff's
25 contention that the jobs identified by the VE require aptitudes
26 exceeding plaintiff's general learning aptitude and her aptitude in
27 verbal, numerical, and manual dexterity. Tr. 26. The ALJ also
28 noted plaintiff's reliance on the information from the book by

1 Kaufman and Lichtenberger. Id.

2 But, the ALJ rejected plaintiff's argument because, he
3 explained, "no information is provided to show the accuracy or
4 reliability of the conversion of the claimant's test scores to
5 percentage rankings using the excerpts that [the attorney] has
6 selected or whether or not such rankings are, or even can be,
7 accurately correlated or compared to the DOT aptitude
8 requirements." Tr. 26. The ALJ concurred with the testimony of
9 Dr. Davis and the VE rather than accepting plaintiff's argument.

10 There are at least two problems with the ALJ's analysis.
11 First, assuming the ALJ meant that he concurred with Dr. Davis's
12 testimony regarding the correlation of plaintiff's raw IQ and
13 scaled IQ scores to percentiles, a review of the transcript of this
14 testimony shows that Dr. Davis's opinions were speculative. In
15 response to questioning by plaintiff's then-counsel regarding the
16 percentage ranking for various scores, Dr. Davis stated that he
17 would "have to get the book in order to answer . . . with any type
18 of accuracy." Tr. 351. Although he agreed with plaintiff's
19 counsel who, consulting a book, queried whether a WAIS scaled score
20 of 6 equaled a 9th percentile, his responses to other questions of
21 this nature were not made with reference to any authority. Tr. 351-
22 52.

23 In response to a question of what the percentile was for an IQ
24 of 72, he indicated it was the 9th percentile, "pretty much," and
25 then said it was "[o]h. Maybe ten. Ninth, tenth, eleventh.

1 Somewhere in there." Tr. 352.⁴ Clearly, Dr. Davis's testimony on
2 this issue, made without reference to "the book" he himself stated
3 he needed to have for his opinions to be accurate, is unreliable.

4 As to the VE testimony, plaintiff's then-counsel questioned
5 the VE at the hearing regarding the aptitude percentiles required
6 for the various DOT positions she identified at the hearing. Tr.
7 360-61. Plaintiff's counsel asked if any of the identified jobs
8 would be eliminated by numerical and verbal aptitudes in the lowest
9 ten percent. Tr. 360. The VE began to look up the percentiles for
10 each of the identified jobs and began with the numerical aptitude
11 percentile for cannery worker which she stated was from the 10th to
12 the 33rd percentile. Tr. 361. Under pressure from the ALJ to
13 speed up her testimony because he did not have time to go through
14 this for each job, the VE offered to "print [the DOT information]
15 out." Tr. 362. Plaintiff's counsel also offered to obtain the DOT
16 job numbers from the VE and then submit post-hearing data. Id.
17 Both the VE and plaintiff's then-counsel submitted DOT job data
18 with the relevant aptitude percentiles after the hearing. Tr. 139-
19 47; 148-56.

20 The problem with the ALJ's reliance on the VE's testimony is
21 that her oral presentation at the hearing was cut short and the
22 written materials she submitted post-hearing are ambiguous because
23 they lack an interpretation of the DOT aptitude requirements which
24 is required to compare them to the relevant IQ data, a comparison
25 the evidence suggests is necessary to determine if plaintiff is

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27
28 ⁴ In contrast, the authorities submitted by plaintiff show
that an IQ of 72 is below the 5th percentile. Tr. 151, 254.

1 qualified to perform the jobs identified by the VE.

2 The ALJ has a duty to develop the record, even when the
3 claimant is represented by counsel. Smolen, 80 F.3d at 1288. The
4 duty is triggered when there is ambiguous evidence. Mayes v.
5 Massanari, 276 F.3d 453, 459-60 (9th Cir. 2001). Moreover, the ALJ
6 has a duty to investigate whether a VE's opinion conflicts with
7 information in the DOT and then elicit an explanation for any
8 inconsistency. Haddock v. Apfel, 196 F.3d 1084, 1090 n.2 (10th
9 Cir. 1999); Soc. Sec. Ruling ("SSR") 00-4p, 2000 WL 1898704
10 (indicating that if there is a conflict between VE evidence and the
11 DOT, the adjudicator must elicit a reasonable explanation for the
12 conflict before relying on VE evidence to support a disability
13 determination).

14 Plaintiff's IQ scores are undisputed. Plaintiff's evidence
15 indicates that these scores are readily transferrable to
16 percentiles which may be easily discerned by reference to different
17 publications. The ALJ rejected plaintiff's argument because in his
18 opinion, plaintiff's evidence failed to show the correlation or
19 comparison of the IQ scores and their percentiles as shown in
20 plaintiff's charts to the DOT aptitude requirements and the
21 percentiles shown in the DOT information provided by the VE.

22 What plaintiff's evidence does show, however, is a possible
23 conflict between the VE's testimony about the jobs plaintiff can
24 perform and the DOT requirements. Given that, the ALJ was
25 obligated to further inquire of the VE regarding the DOT aptitude
26 requirements and the DOT percentiles. The VE is the expert who
27 should explain to the ALJ whether the percentiles commonly used as
28 an interpretation of IQ scores are the same percentiles attributed

1 by the DOT to the various aptitudes required for the identified
2 jobs. Without this evidence, the ALJ cannot make a reasonable
3 interpretation of the evidence that was before him. The ALJ erred
4 by failing to elicit such testimony from the VE.

5 E. Plaintiff's Manual Dexterity

6 During the hearing, plaintiff's then-counsel queried the VE
7 regarding the DOT manual dexterity percentile requirements for the
8 jobs identified by the VE. Tr. 359-60. In response to the
9 questioning, the VE stated that the motel maid and dishwasher
10 positions required manual dexterity in the 10th to 33rd
11 percentiles. Id. The post-hearing DOT information submitted by
12 the VE to the ALJ shows that the cannery worker, agricultural
13 produce sorter, and small products assembler all require manual
14 dexterity in the 34th to 65th percentiles. Tr. 140-42.

15 Before her December 2002 hearing, plaintiff submitted the
16 results of a February 2000 career preference test to the Social
17 Security Administration. Tr. 132-135A. In the cover letter
18 accompanying the evidence, plaintiff's then-counsel noted that the
19 title of the test was the "Career Occupational Preference System"
20 or COPS. Tr. 132. He indicated that the attached summary of
21 results was four pages and that the third page included a "CAPS
22 Ability Profile" showing that plaintiff was in the lowest 10% in
23 the following abilities: numeric ability, language usage, word
24 knowledge, and manual speed and dexterity. Id.⁵ This evidence

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26 ⁵ I cite to the cover letter instead of to the actual test
27 results because that page appears to be missing from the record.
28 The cover letter and its attachments are Exhibit 18E which the
record indicates is five pages. Tr. 132. Page four is missing.
Upon remand, the record should be amended to include the missing

1 provided the basis for plaintiff's argument to the ALJ that she
2 lacks the manual dexterity to perform any of the jobs identified by
3 the VE.

4 The ALJ did not credit plaintiff's evidence. He stated that
5 (1) the test was completed in February 2000, more than one year
6 before her protected application date of June 11, 2001; (2) no
7 information was provided regarding the circumstances or conditions
8 under which the test was administered or completed and no
9 information was provided regarding the particular test or its
10 accuracy and reliability; and (3) there was no information showing
11 a correlation between the test results and the DOT requirements or
12 a commonality between the terms or results for purposes of
13 comparison. Tr. 26.

14 I agree with plaintiff that the ALJ erred. First, while the
15 test was administered before her protected filing date, it was
16 nonetheless after her alleged onset date of October 1, 1999, making
17 it relevant to her disability determination. Second, as with the
18 verbal and numeric aptitude evidence, the evidence plaintiff
19 submitted to the ALJ at a minimum raises the question of whether
20 plaintiff can perform the jobs identified by the VE with her level
21 of manual dexterity. The DOT undisputedly provides that plaintiff
22 must have manual dexterity in at least the 10th percentile to
23 perform several of the identified jobs, and in some cases must have
24 manual dexterity in at least the 34th percentile. If the record
25 establishes that plaintiff's manual dexterity is below that level,
26 then the VE's testimony is not supported by the DOT. The burden is

27 _____
28 page.

1 on the ALJ to elicit the necessary information from the VE to make
2 a final determination regarding plaintiff's manual dexterity. The
3 ALJ failed to do so. Remand is appropriate.

4 F. VE Hypothetical

5 Plaintiff argues that the vocational hypothetical did not
6 include all of plaintiff's limitations and thus is invalid. Nguyen
7 v. Chater, 100 F.3d 1462, 1466 n.3 (9th Cir. 1996) (incomplete
8 hypothetical does not constitute competent evidence to support a
9 finding that claimant can do jobs set forth by VE).

10 Given my recommendation that this case be remanded for the ALJ
11 to address the issue of plaintiff's adjustment disorder with
12 depressed mood, to consider plaintiff's mother's testimony, and to
13 seek additional testimony from the VE regarding the DOT aptitude
14 requirements, I need not separately address the validity of the
15 hypothetical. The evidence submitted post-remand on the relevant
16 issues will dictate whether the hypothetical used in the December
17 2002 hearing was valid or invalid.

18 IV. Post-Decision Evidence Submitted to the Appeals Council

19 After the ALJ's decision, and while the case was on appeal to
20 the Appeals Council, plaintiff submitted additional evidence to the
21 Appeals Council, including an employer questionnaire, a table
22 showing percentile ranks for deviation IQs, and a "CAPS Manual."
23 Tr. 299-315. Plaintiff cites to this evidence in support of her
24 arguments in this case. Defendant argues that this Court cannot
25 consider the evidence and to the extent this evidence may be
26 considered at all, it is only pursuant to a remand under 42 U.S.C.
27 § 405(g) after plaintiff shows that the evidence is new and
28 material and establishing that there is good cause for her failure

1 to submit the evidence earlier.

2 If I understand it correctly, defendant's argument is that
3 because a denial of review by the Appeals Council is not a final
4 decision, district courts do not have jurisdiction to consider an
5 Appeals Council's denial of review and without such jurisdiction,
6 a district court's jurisdiction to review evidence submitted to the
7 Appeals Council must comply with the requirements set forth in
8 section 405(g). Although defendant cites cases from other circuits
9 for the proposition that a district court lacks jurisdiction to
10 review an Appeals Council's denial of review because the denial of
11 review is not a final decision, defendant fails to cite any cases
12 supporting its position that in such cases, the district court may
13 not consider evidence submitted to the Appeals Council.

14 Moreover, defendant's argument is contrary to the Ninth
15 Circuit's decision in Ramirez v. Shalala, 8 F.3d 1449, 1451-52 (9th
16 Cir. 1993). There, the plaintiff requested that the Appeals
17 Council review the ALJ's denial of his disability claim. Id. at
18 1451. The plaintiff submitted an additional report from his
19 treating psychologist to the Appeals Council that he had not
20 submitted to the ALJ. Id. The Appeals Council denied review,
21 making the ALJ's decision final. Id.

22 The district court affirmed the ALJ and the plaintiff
23 appealed. The Ninth Circuit stated that it considered "the rulings
24 of both the ALJ and the Appeals Council." Id. It explained that
25 although the Appeals Council "declined to review" the ALJ's
26 decision, the Appeals Council reached its "declined to review"
27 ruling after considering the case on the merits, examining the
28 entire record, including the additional material, and concluding

1 that the ALJ's decision was proper and that the additional evidence
2 failed to provide a basis for changing the ALJ's decision. Id. at
3 1452. The court then concluded that "[f]or these reasons, we
4 consider on appeal both the ALJ's decision and the additional
5 material submitted to the Appeals Council." Id.

6 Such is the case here. The Appeals Council considered the
7 case on the merits, examined the entire record, including the
8 material sent post-hearing to the Appeals Council by plaintiff's
9 then-counsel, and concluded that the record, including the new
10 evidence, did not provide a basis for changing the ALJ's decision.
11 Tr. 5-9. If "these reasons" were sufficient for the Ninth Circuit
12 to review both the ALJ's decision and the material submitted
13 directly to the Appeals Council in Ramirez, they are sufficient for
14 this Court to review both the ALJ's decision and the evidence
15 submitted post-hearing to the Appeals Council in the instant case.
16 In any event, the material should be considered by the ALJ upon
17 remand.

18 CONCLUSION

19 I recommend that the ALJ's decision be remanded for
20 reconsideration of the issues identified herein. I further
21 recommend that should the Article III District Court Judge adopt
22 this Findings & Recommendation, a Judgment reversing and remanding
23 the case pursuant to sentence four of section 405(g), be entered.

24 SCHEDULING ORDER

25 The above Findings and Recommendation will be referred to a
26 United States District Judge for review. Objections, if any, are
27 due July 15, 2005. If no objections are filed, review of the
28 Findings and Recommendation will go under advisement on that date.

1 If objections are filed, a response to the objections is due
2 July 29, 2005, and the review of the Findings and Recommendation
3 will go under advisement on that date.

4 IT IS SO ORDERED.

5 Dated this 30th day of July, 2005.

6
7 /s/ Dennis J. Hubel

8
9

Dennis James Hubel
United States Magistrate Judge